

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. ONE CALL COMMUNICATIONS, INC., Respondent.	DOCKET NOS. FCU-04-54 FCU-04-63 FCU-04-64 FCU-05-1 FCU-05-3 FCU-05-8 FCU-05-12 FCU-05-15 FCU-05-24 FCU-05-25 FCU-05-43 FCU-05-45
--	---

ORDER ASSESSING AND SUSPENDING CIVIL PENALTIES

(Issued May 9, 2006)

The procedural history that forms the background of this order was listed in the "Order Regarding Motion for Default and Order to Show Cause" issued on April 4, 2006 (Show Cause Order), and will not be repeated in this order. Pursuant to Iowa Code §§ 476.103(4) and 476.51, a show cause hearing was set for April 19, 2006, and One Call Communications, Inc. (One Call) was ordered to show cause at the hearing why a civil penalty of \$500 should not be imposed for One Call's failure to comply with orders issued on January 17 and March 20, 2006, that required One Call to produce the answers to data request numbers 23-25, 45-46, 52-53, and 62-63 to the Consumer Advocate Division of the Department of Justice (Consumer Advocate). The Show Cause Order also ordered One Call to immediately provide the answers to

the Consumer Advocate and bring them to the show cause hearing, and stated this could be done in electronic form. One Call was also put on notice that failure to provide the answers to the Consumer Advocate by April 18, 2006, would be regarded as willful and subject One Call to civil penalties pursuant to Iowa Code § 476.51(2), and that for purposes of the daily penalty provisions of Iowa Code § 476.51(3), the time specified for compliance was April 18, 2006. At the request of One Call, the show cause hearing was rescheduled to April 24, 2006.

A show cause hearing was held on April 24, 2006, in Board Conference Room 3, 350 Maple Street, Des Moines, Iowa. One Call was represented by its attorney, Ms. Krista Tanner. Ms. Ann C. Bernard, secretary and general counsel of One Call, testified on behalf of One Call. Ms. Bernard was connected to the hearing by telephone conference call. The Consumer Advocate was represented by its attorney, Mr. Craig Graziano.

One Call witness Ms. Bernard testified that when the order compelling discovery was issued January 17, 2006, One Call did not have the responses ready to turn over to the Consumer Advocate. (Tr. 8.) She testified One Call was waiting to see if the motion to compel would be granted and if the scope would be limited. (Tr. 8.) Once the order was issued, One Call did not start researching the request right away. (Tr. 8.) Ms. Bernard testified One Call was "still trying to find out all the things that we needed to work on." (Tr. 8.) She testified One Call was trying to find out whether the case was going to be appealed and looked into its options going into

federal court. (Tr. 8.) She testified One Call also faced the challenge that its employee, Mr. Victor Krayterman, who would do the work to respond to the data requests, was tied up with other day-to-day work. (Tr. 8-9.)

Ms. Barnard testified the magnitude and scope of the data request was overwhelming and the company was dealing with other pressing issues to keep it afloat at the time. (Tr. 9.) Ms. Barnard testified it was not the company's intent to not answer the data requests. (Tr. 10.) She testified she did not feel there was anything in the order that required the responses to be provided immediately. (Tr. 10.)

Ms. Barnard testified all of the company's systems are proprietary and were built by their employee, Mr. Krayterman. (Tr. 11.) Ms. Barnard testified that the company has been unable to find someone else who can do what Mr. Krayterman can, and although the company hired two people to work with Mr. Krayterman, they are only able to do basic tasks. (Tr. 11.) She also testified the company is having some financial difficulty. (Tr. 9-12.)

Ms. Barnard testified One Call decided in mid-February that it was going to file the request for declaratory ruling in federal court, and at that point, it stopped working on the discovery request. (Tr. 12.) She testified One Call did not think it would have to work on the discovery request and pull together the requested data since it intended to go to federal court. (Tr. 12.) She testified the requested task was monumental, and in order to complete it, Mr. Krayterman had to write computer code to search for data from databases that were never intended to be searched. (Tr. 12.)

She testified the databases deal with customer service and are an internal history for the company to address consumer issues and needs, but were never meant to be a research database source of information. (Tr. 12–13.) She further testified the company completes over 500,000 calls per month for different types of calls so there is a lot of data to search to answer the data requests. (Tr. 13.)

Ms. Barnard testified One Call began researching the request again after it received the Show Cause Order. (Tr. 13.) As of the date of the hearing, One Call had not completed the answers to the data requests. (Tr. 14.) Ms. Barnard testified the company is still trying to figure out how to retrieve the requested data so it is useable and does not include information that was not requested. (Tr. 14.) She testified One Call intends to comply with the order compelling discovery and is in the process of obtaining the answers. (Tr. 14.) She testified One Call does not know when the task can be completed. (Tr. 14.)

One Call answered the data requests with respect to the Iowa billings, and it took Mr. Krayterman about three and one half days to write the codes to retrieve the Iowa information. (Tr. 15–16.) Ms. Barnard testified it was much more difficult to obtain the information for nationwide and international calls for several reasons. (Tr. 16.) With the Iowa database, One Call could limit the scope to just an Iowa NPA-NXX. (Tr. 16.) When searching for the rest of the world, Ms. Barnard testified One Call has to look at different databases and exclude information that is not relevant, and these databases were never intended to be researched in the way

needed for the answers to the data requests. (Tr. 16-18.) She testified it was much easier to identify the information for just one state. (Tr. 17.) In order to obtain the answers to the data requests, Ms. Barnard testified Mr. Krayterman has to write the code to search the databases, and the most difficult part is to write the code of what is not to be included. (Tr. 19.) He also has to write the code for each number identified by the Consumer Advocate. (Tr. 19.) She testified Mr. Krayterman's biggest challenge is to come up with enough time to be able to sit down and concentrate. (Tr. 19.) She testified One Call is not in a position where it can let Mr. Krayterman have two or three days uninterrupted time to write the code because he is involved with other work. (Tr. 19-20.) Ms. Barnard testified Mr. Krayterman could probably write the necessary code in two to three days of uninterrupted time. (Tr. 20-21.) He would also have to run the system, collect the data, and check it to make sure it is what was requested. (Tr. 21.) When the undersigned asked Ms. Barnard when One Call could get the answers to the data requests to the Consumer Advocate, Ms. Barnard agreed to provide the answers by May 19, 2006. (Tr. 33.)

During the hearing, the attorney for One Call asked that her client not be punished for her failure to respond to the Consumer Advocate's emails. (Tr. 22.) In contested cases such as this one, the actions of the attorney and the client cannot be separated. At all times, the attorney is representing her client.

Iowa Code § 476.103(4)(a) provides that, in addition to the civil penalties in Iowa Code § 476.51, a service provider who violates an order lawfully issued by the

Board pursuant to § 476.103 is subject to a civil penalty, which, after notice and the opportunity for hearing, may be levied by the Board in the amount of not more than \$10,000 per violation. Iowa Code § 476.51(1) provides that a public utility, which, after written notice by the Board of a specific violation, violates the same provision of an order lawfully issued by the Board, is subject to a civil penalty of not less than \$100 nor more than \$2,500 per violation. Iowa Code § 476.51(2) provides that if the violation is willful, the utility is subject to a penalty of not less than one thousand dollars nor more than ten thousand dollars per violation. Iowa Code § 476.51(3) provides that in the case of a continuing violation, each day a violation continues after the time specified for compliance in the written notice is a separate and distinct offense.

Board rule 199 IAC 7.15(2) states: "Unless otherwise ordered by the board or presiding officer or agreed to by the parties, data requests or interrogatories served by any party shall either be responded to or objected to, with concisely stated grounds for relief, within seven days of receipt." When One Call received the order issued January 17, 2006, granting the Consumer Advocate's motion to compel, One Call was unjustified in ignoring the order and doing nothing. Companies are always busy running their businesses, and participation in litigation, including complying with discovery requests, will always take time away from the company's regular business. It will always be somewhat difficult to find the time to prepare required answers. However, "the expense and annoyance of litigation is 'part of the social burden of

living under government.' " FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 (1980) (quoting Petroleum Exploration, Inc. v. Public Service Comm'n, 304 U.S. 209, 222 (1938)). One Call's arguments at the Show Cause Hearing that Mr. Krayterman was busy with other duties do not provide justification for failure to respond to the order. One Call had an obligation to comply with the order and in the timeframe required by rule 7.15(2). As contemplated by that rule, if One Call had difficulty providing the answers to the data requests within seven days of receipt of the order, it was required to contact the attorney for the Consumer Advocate within the seven-day period and request accommodation. The parties were then required to attempt to work out a solution in good faith without the involvement of the undersigned. 199 IAC 7.15(4) and (5); Iowa R. Civ. P. 1.501(2).

One Call did none of this. Instead, it took no action with respect to the order. The order was issued over one month before One Call filed its suit in federal court. There is no justification for One Call's failure to act. When One Call was again ordered to immediately provide the answers to the Consumer Advocate in the order issued March 20, 2006, it again took no action. One Call only began work to prepare answers to the data requests after receiving the Show Cause Order.

Based on the evidence in the record, including the evidence from the show cause hearing, the undersigned finds a clear unjustified violation by One Call of the orders requiring it to provide the answers to data request numbers 23-25, 45-46, 52-53, and 62-63 to the Consumer Advocate. Therefore, pursuant to Iowa Code

§§ 476.51(1) and 476.103(4), and considering the factors set forth in Iowa Code §§ 476.51(3) and 476.104(4)(b), the undersigned will assess a civil penalty of \$500 on One Call.

However, at the show cause hearing, One Call agreed to provide the required answers to the Consumer Advocate by May 19, 2006. Therefore, the undersigned will suspend the required payment of this civil penalty under the following conditions. If One Call provides the required answers to the Consumer Advocate by May 19, 2006, and files notice with the Board that it has so provided the answers by May 20, 2006, the undersigned will issue an order rescinding the assessment of the \$500 civil penalty. However, if One Call fails to provide the required answers to the Consumer Advocate on or before May 19, 2006, the undersigned will issue an order lifting the suspension and requiring One Call to pay the civil penalty. In addition, failure to provide the required answers to the Consumer Advocate on or before May 19, 2006, may subject One Call to further penalties pursuant to Iowa Code §§ 476.51(2) and (3).

IT IS THEREFORE ORDERED:

1. On or before May 19, 2006, One Call shall provide the answers to data request numbers 23–25, 45–46, 52–53, and 62–63 to the Consumer Advocate. The answers may be provided in electronic form.

2. On or before May 20, 2006, One Call shall file notice with the Board that it has provided the answers to data request numbers 23–25, 45–46, 52–53, and

62-63 to the Consumer Advocate. One Call should not file the answers themselves with the Board.

3. Pursuant to Iowa Code §§ 476.51(1) and 476.103(4), and considering the factors set forth in §§ 476.51(3) and 476.104(4)(b), One Call is assessed a civil penalty in the amount of \$500. The requirement to pay this civil penalty is suspended until further order.

4. Failure to provide the required answers to the Consumer Advocate on or before May 19, 2006, may subject One Call to further penalties pursuant to Iowa Code §§ 476.51(2) and (3).

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 9th day of May, 2006.